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Supreme Court, U.S.
FILED
JUN - 8 2004
OFFICE OF THE CLERK

No. 03-9659

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

DOUGLAS DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether the Court of Appeals—in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from his capital jury in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)—so contravened this Court's decision and analysis of the evidence in *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), that "an exercise of this Court's supervisory powers" under Supreme Court Rule 10(a) is required to sustain the protections against invidious discrimination set forth in *Batson* and *Miller-El* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. §§ 2254(d)(2) and (e)(1).

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Respondent asserts (Opp. 7) that the court of appeals "carefully reviewed the trial record and the evidence presented by" Petitioner and "did not discount any evidence as irrelevant." But to the contrary, notwithstanding this Court's painstaking analysis last Term of every relevant category of evidence, the Fifth Circuit dismissed with barely an explanation two of the four categories of evidence of discriminatory intent. And in addressing the other two categories, it consistently disregarded conclusions this Court had reached and methodological guidance this Court had given.

To defend this result, Respondent's brief in opposition mostly recycles unsuccessful arguments the State made to this Court last Term. Thus it too drives home how little impact this Court's previous opinion has had on the Fifth Circuit's analysis of Petitioner's *Batson* claim. It also demonstrates the difficulty of making *Batson* meaningful at the crucial step-three evidence-weighing stage without more explicit modeling of the process by this Court.

This Reply necessarily delves once again into the details of the voir dire process. But this case does not turn on factual nuances. To the contrary, it presents a broad, fundamental issue. This Court has often used its supervisory authority to give guidance to the lower courts concerning methods for handling evidence and for implementing rules of criminal procedure. This case cries out for an exercise of that supervisory authority. For if the Fifth Circuit's widely watched decision goes uncorrected, its "dismissive and strained" approach to analyzing evidence of racial discrimination in jury selection (App. 40a) may well become a path-marking precedent for the lower courts, countermanding the teaching of this Court's *Miller-El* opinion.

THE FIFTH CIRCUIT IGNORED THIS COURT'S GUIDANCE ABOUT HOW TO ANALYZE EVIDENCE OF RACIAL DISCRIMINATION

A. The Court Discounted Evidence Of Longstanding Discrimination In Jury Selection And Disregarded The State Courts' Failure To Address That Evidence

Last Term, this Court held that the historical evidence that the "culture of the District Attorney's Office" was "suf-

fused with bias against African-Americans in jury selection" (App. 43a) was clearly relevant to the ultimate question of purposeful discrimination in Petitioner's jury selection. Yet the Fifth Circuit on remand simply refused to consider this evidence in assessing the plausibility of the prosecution's reasons for its peremptory strikes. Respondent insists (Opp. 28) that the court did take account of the evidence, or at least "acknowledged" it, but despite this Court's observation that "it goes without saying" that the historical evidence was relevant at step three, the court of appeals cabined its significance to step one, noting that it was of little importance specifically "because Miller-El has already met the burden under the first step." App. 10a.

This Court also faulted the state courts for making "*no mention* of . . . the historical record of purposeful discrimination" in evaluating Petitioner's claim. App. 44a (emphasis added). And it explained that this failure heightened the concern that the state courts had erred because, even when presented with this evidence of a pattern and practice of discrimination, the trial court "somehow reasoned that there was not even the inference of discrimination to support a prima facie case"—a clear error that the State subsequently declined to defend. *Id.* Yet the Fifth Circuit on remand continued to ignore these failings, insisting that the state trial court had "heard the historical evidence" and was "in the best position to make a factual credibility determination" (App. 10a)—despite the fact, noted by this Court, that the state court held its *Batson* hearing *two years* after the trial.

Respondent's only defense of the Fifth Circuit's continued uncritical embrace of the fundamentally flawed trial court decision is to resurrect two claims that this Court has already expressly rejected. Respondent contends (Opp. 27a-30a) that the state court *did* weigh the powerful historical evidence of racial discrimination in the D.A.'s office. But this Court pointed out that the state court "made no mention" of that evidence. App. 44a. And Respondent attempts to rationalize what he acknowledges was the "seemingly insupportable determination" (Opp. 29) that Petitioner failed to establish even a *prima facie* case of racial discrimination

by contending that the state court mistakenly believed that it should take account of the prosecution's proffered justifications for its strikes at step one. But this blatant legal error hardly supplies a basis for confidence in the care with which the state court analyzed Petitioner's *Batson* claim.[1]

Finally, Respondent attempts to undermine one particularly powerful element of contextual evidence of racial animus, the fact that one of the two prosecutors in Petitioner's trial was found guilty of a *Batson* violation in another capital murder trial held at roughly the same time as Petitioner's trial, based on the same sorts of manipulations of the voir dire through disparate questioning as were present in Petitioner's case. App. 42a (citing *Chambers* v. *State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)). But Respondent's attempted rebuttals are either false or irrelevant. Contrary to Respondent's claims, the finding of a *Batson* violation in *Chambers was* before the state courts that reviewed the trial court's *Batson* decision in this case (Reply Br. 18 n.26, *Miller-El* v. *Cockrell*, No. 01-7662) and prosecutor Macaluso *was* the attorney who directed the State's entire voir dire in *Chambers*, *Miller-El* v. *Johnson*, No. 3:96-CV-1992-H (N.D. Tex. 2000), Amended Habeas Pet., Ex. 15, at 32.

B. The Court Disregarded The Jury Shuffle Evidence

This Court concluded that "the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." App. 42a. That suspicion, this Court explained, "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor." *Id.* This Court's concerns were "amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the ... District Attorney's Office

[1] Indeed, far from exculpating the trial court, this error is all the more damning because the court made it *after* the appellate court had expressly instructed that Petitioner *had* made out a *prima facie* case.

had, by its own admission, used this process" precisely "to manipulate the racial composition" of juries. *Id.*

Despite this Court's instruction that the jury shuffle evidence was relevant both to show the prosecution's discriminatory purpose and to call into question the adequacy of the state court's approach to the *Batson* evidence more generally, the Fifth Circuit utterly failed to take the jury shuffle evidence into account. The court's discussion of that evidence consists of two sentences. In the first, it offered the bafflingly irrelevant assertion that the defense also used jury shuffles. App. 10a. In the second, it conclusorily asserted that the evidence was insufficient to "overcome" the prosecution's "race-neutral reasons" for its peremptory challenges, which were "accepted by the state court who observed the *voir dire* process including the jury shuffles." *Id.*

Respondent offers neither an explanation nor a defense of the Fifth Circuit's dismissive handling of the jury shuffle evidence. Instead, apparently acknowledging the Fifth Circuit's failure to address that evidence, Respondent quickly asserts (Opp. 32), contrary to this Court's conclusion, that "in any event" the jury shuffle evidence does not really support an inference of discriminatory purpose. Respondent then hauls out two of the three patently pretextual rationalizations for the prosecutors' jury shuffle behavior that he used when this case was argued before this Court last Term. The first—that defense counsel's shuffle was not physically vigorous enough because many venire members simply moved from the front to back of the panel or vice versa—could hardly be a bona fide objection. The State's own shuffling resulted in just the same sort of clumping of jurors, but with African-Americans clustered near the back instead of the front. The second explanation, that the State made its objection before knowing the result of the shuffle, was expressly rejected by this Court, when it concluded that the genuine objection came only "after the new racial composition was revealed." App. 42a.

The undermining effect of the jury shuffle evidence on the credibility of the prosecution's pretensions to race neutrality is only strengthened by the State's pretextual ration-

alizations for that evidence. The Fifth Circuit has now had two opportunities, and the State has had three in briefs to this Court, to offer some plausible explanation that would weaken the inference of racially discriminatory intent that this Court found in that evidence. Yet both remain unable to do so. The jury shuffle constitutes important evidence that the prosecutors sought to exclude African-Americans from Petitioner's jury; the Fifth Circuit's persistent failure to acknowledge the force of that evidence requires correction.

C. The Court Failed To Give Proper Weight To Evidence That The Prosecution Used Disparate Questioning To Remove African-Americans

When this Court last heard this case, it condemned "the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning." App. 40a. Yet on remand the Fifth Circuit did little more than restate that same discredited interpretation.

With respect to disparate questioning about the death penalty, the Fifth Circuit simply copied, *sometimes verbatim*, the arguments of this Court's lone dissent intended to show that the prosecutors' use of the "graphic script" was driven by venire members' ambivalence about the death penalty, not race. Those arguments fail, for at least three reasons. First, they depend on sheer speculation about the contents of 8 juror questionnaires that are not even in the record.[2] Second, the Fifth Circuit's and the State's speculation that those 8 venire members were ardent death penalty opponents conflicts with the State's own account that those jurors had simply "expressed reservations about the death penalty." Resp. Br. 18 & n.39, *Miller-El* v. *Cockrell*, No. 01-7662. The 10 blacks/10 whites comparison was based, as this Court noted, on "the State's . . . calculations." App. 41a. Third, the State's figures actually undercount by at least 8 the number of whites who expressed ambivalence about the

[2] Respondent's attack on Petitioner for failing to get the questionnaires made part of the habeas record is unfounded, but even if it were true, it would have no bearing on the impropriety of the court of appeals' decision simply to make up the contents of those questionnaires.

death penalty but did not face the graphic script. Thus, racial disparity in use of the graphic script was even greater than the court below acknowledged.[3]

Last Term, this Court noted that the evidence of disparate questioning about minimum sentencing—94% of whites told about the statutory minimum as compared to 12.4% of African-Americans—suggested "even greater disparity along racial lines" than the questioning about the death penalty and that the State offered "[n]o explanation . . . for the . . . disparity." App. 41a. Yet on remand, the Fifth Circuit baldly denied the existence of the disparity, stating that the prosecution "did not question venire members differently concerning their willingness to impose the minimum punishment." App. 21a. Respondent defends that position by repeating its contention (Opp. 26) that the prosecution withheld information about the statutory minimum only from venire members who had expressed views "unfavorable to the State." But this Court previously found that there were at least two whites (Mazza and Hearn) who "also expressed ambivalence about the death penalty in a manner similar to their African-American counterparts" but who admittedly were not subjected to this manipulative questioning. *Id.* at 40a; *see* Resp. Br. 19 & n.44, *Miller-El* v. *Cockrell*, No. 01-7662. And Respondent leaves unexplained the State's failure to use its manipulative script with the vast majority of whites who expressed reservations about the death penalty. App. 41a; Reply Br. 17 n.23, *Miller-El* v. *Cockrell*, No. 01-7662.[4]

[3] In addition to the 10 identified by the State, Mazza, Hearn, Vickery, Salsini, Duke, Sohner, Crowson, and Whaley expressed hesitancy. Two of those, Mazza and Hearn, served on the jury.

[4] Respondent asserts (Opp. 26)—without any citation to the record—that "almost all" whites who were opposed to the death penalty were removed before questioning about minimum punishments. But 34 whites did not face the manipulative script, at least some of whom (as Respondent's use of the word "almost" acknowledges) expressed opposition to the death penalty or were in some other way "unfavorable to the State."

It is also important to note that in its discussion of disparate questioning the Fifth Circuit never even mentioned a fact this Court found

In its preliminary analysis, this Court concluded that "[d]isparate questioning did occur" and that "a fair interpretation of the record . . . is that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." App 40a, 42a. Nothing in the Fifth Circuit's decision, or in the State's defense of it, weakens those conclusions. Indeed the inaccurate rationalizations offered by Respondent for that racially disparate questioning only strengthen the inference that the State was bent on eliminating as many African-Americans as possible.

D. The Court Failed To Analyze The Treatment Of Similarly Situated Venire Members Properly

This Court determined that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." App. 39a. Yet on remand, the Fifth Circuit insisted to the contrary that "there were no unchallenged non-black venire members similarly situated" to the struck African-Americans. App. 11a. Even the limited space available suffices to demonstrate a few of the fundamental flaws in the Fifth Circuit's (and the State's) comparative juror analysis.

First, as a premise for juror comparisons, the court simply accepted the State's characterization of the struck African-Americans as overly ambivalent about the death penalty. For example, it accepted the view that Billie Jean Fields was struck because his "deeply held religious belief in the rehabilitative capacity of all persons" would make him hesitate to vote for the death penalty. App. 12a. Yet Fields was one of the most pro-death penalty members of the venire. He expressed unambiguous support for the death penalty on his questionnaire and then wrote "[i]f you commit the crime pay the pen[alt]y." JL 20. Although Fields believed that everyone can be rehabilitated, he made it clear that he

highly significant: that while petitioner's case was on direct appeal, the Texas Court of Criminal Appeals "found a *Batson* violation where this precise line of questioning on mandatory minimums was employed by one of the same prosecutors who tried" Petitioner's case. App. 42a.

would vote for the death penalty *even* for someone who could be rehabilitated. JA 118-119. In his view, "the State is God's extended person" and "if the State exacts death, then that's what it should be." JA 108. "In its extended service, the State represents Him if the crime has been committed and death is warranted." *Id.*

Second, when the Fifth Circuit compared struck African-Americans with unchallenged whites, it consistently overemphasized African-Americans' hesitancy about the death penalty, confidence in rehabilitation, or involvement with family members with criminal histories while downplaying those same traits in comparable whites. The court of appeals treated white juror Sandra Hearn as less ambivalent than Fields about the death penalty, for example, even though she expressly stated that her support for death *depended* on the defendant's prospect of rehabilitation.[5]

Similarly, the only reason given by the prosecution for striking African-American Edwin Rand was his uncertainty about imposing the death penalty. But his ambivalence was less pronounced than that of seated white jurors Hearn and Mazza. Rand wrote on his questionnaire that he supported the death penalty "depending on [the] crime." JL 36. Just like Rand, Mazza wrote on her questionnaire that her support for the death penalty "[d]epends on the crime." JL 148. After expressing some initial hesitation during voir dire, Rand confirmed his ability to vote for death, and indeed, said that he could impose death even for non-capital murder. When asked if she could impose the death penalty, Mazza responded, "It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends . . . that would be something that I would feel like I could do. It's difficult." JA 519. Even the concurring and dissenting Justices last Term acknowledged the similarity between Rand and Hearn

[5] "I believe in the death penalty *if* a criminal cannot be rehabilitated and continue[s] to commit the same type of crime." JA 694 (emphasis added).

and Mazza. App. 49a, 59a. Yet the Fifth Circuit dismissed the similarity as not clear enough.

E. The Court Failed To Assess Whether The Trial Court's Judgment Was Entitled To Deference, And To Consider The Cumulative Weight Of The Evidence

Running through the court of appeals' mishandling of the various categories of evidence are two overarching errors of method: (i) a failure to assess critically how shortcomings in the state courts' reasoning undermined the deference to which state court judgments would otherwise be entitled and (ii) a failure to weigh the evidence of racially discriminatory purpose as a whole. This Court should correct those methodological errors so that other courts will not follow the Fifth Circuit's mistaken lead.

Again and again, the Fifth Circuit refrained from any independent analysis of the state court's finding of no racial discrimination. It endorsed the state court's handling of the historical evidence, although this Court had found that the state court did not even mention that evidence and had inexplicably held that Petitioner had failed to establish even a *prima facie* case. It dismissed the jury shuffle evidence because the trial judge had been present during the jury shuffles, although the *Batson* hearing in which that evidence was considered didn't take place until two years later and, "[a]s a result," this Court noted, "was subject to the usual risks of imprecision and distortion from the passage of time." App. 39a. It adopted the state court's determination that no disparate questioning had occurred, although this Court had reached just the opposite conclusion. It embraced the state court's comparative juror analysis, although this Court had found that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" (App. 39a) and it "accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial" (App. 38a) although this Court had cautioned it not to. Altogether, it treated the state court's finding of no discrimination as making the "credibility of the [prosecutors'] reasons . . . self-evident." App. 11a.

On habeas review, federal courts defer to state courts' factual findings. But deference must be informed by an assessment of the reasonableness of the state courts' methods of analysis. Blind acceptance, like that practiced by the Fifth Circuit, sets a precedent for turning deference into "abandonment or abdication of judicial review." App. 37a.

The Fifth Circuit also set a dangerous example by examining separately each type of evidence and asking whether it *alone* disproved the State's proffered race-neutral explanations. Considered in isolation, the fact that the prosecutors had been trained to exclude minorities from juries or that one of them had been found guilty of discriminatory jury selection at virtually the same time as Petitioner's trial were not enough to undermine the prosecutors' claims. The prosecutors' jury shuffle behavior, which has no explanation other than racial exclusion, was not enough alone to call their reasons into question. That the prosecutors deliberately engaged in two forms of manipulative and racially disparate questioning was not enough alone to discredit their reasons. And that they struck African-Americans who were no more unfavorable than a number of whites the prosecutors left unchallenged was not enough alone to undermine their pretensions to evenhandedness.

But the issue, as this Court had already explained, is not whether each piece of evidence considered in isolation suffices to "overcome" (App. 10a) the race-neutral reasons given by the prosecution. A single piece of evidence rarely does. The issue is whether the cumulative weight of all the evidence so erodes the prosecution's credibility that the prosecution's reasons become "simply too incredible" to believe. *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991). In this case, that cumulative weight was overwhelming.

CONCLUSION

For the foregoing reasons, as well as those presented in the Petition, the Court should issue a writ of certiorari.

Respectfully submitted.

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